The court responded and held, in part, that petitioners' attorneys were not entitled to all of the fees requested:

> Based on this language [of the offers of judgment] and a review of the relevant arguments by counsel, I find that fees only for time incurred through the date of the June 10, 1993 offer, or 42.2 hours, should be allowed.

Pet. App. 30.

On September 2, 1993, petitioners filed a lengthy memorandum objecting to the Magistrate's Findings and Recommendations. Supp. E.R. 1-14.

The magistrate's recommendations were accepted by order of the court on October 4, 1993. E.R. 61-62. On review, the district court held:

> Plaintiffs also object to the denial of fees incurred after they accepted offers of judgement. As the magistrate found, the explicit terms of the offers dictate this result.

Pet. App. 36.

Petitioners appealed to the Ninth Circuit Court of Appeals. The Ninth Circuit affirmed the district court's orders without oral argument, in spite of petitioners' Motion to Reconsider hearing without oral argument. Pet. App. 13-14. The Ninth Circuit held that the offers accepted by petitioners explicitly "limit[ed] fees and costs to those *'incurred by this plaintiff prior to the date of this offer in an amount to be set by the court.'*" (Emphasis added by the court). Pet. App. 6. The court also considered and rejected Plaintiffs' policy arguments. Pet. App. 7-9.

Petitioners misstate the district court's and Ninth Circuit's holdings on page 1 of the Petition for Writ of Certiorari. The courts did not hold that the entitlement to attorney fees was cut off by Rule 68. Rather, both courts determined that the language of the offer of judgment cut off entitlement to attorney fees past the date of the offer of judgment.

Petitioners' Petition for Rehearing/Suggestion of Rehearing *en banc* was denied. Pet. App. 11-12.

REASONS FOR DENYING THE WRIT

This case fails to meet criteria set forth in Rule 10 of the Rules of the Supreme Court for granting writ of Certiorari. Petitioner has failed to identify any conflict between circuits, and there are no important questions of federal law that warrant review by this Court.

Generally, prevailing plaintiffs in civil rights cases filed under 42 U.S.C. §§ 1983 and/or 1988 are allowed to recover attorney fees for efforts made while litigating the amount of attorney fees.[2] It is equally well established that settlement offers made pursuant to Rule 68 may be conditioned upon waiver of such costs and fees. *Evans v. Jeff D.*, 475 U.S. 717, 737-38, *reh'g denied*, 476 U.S. 1179 (1986); *Rice v. Gates Rubber Co.*, 584 F.2d 135, 136-37 (6th Cir. 1978); *Chicano Police Officer's Ass'n v. Stover*, 624 F.2d 127, 132 (10th Cir. 1980); *Jones v. Federated Department*

[2] *See generally, Clark v. City of Los Angeles*, 803 F.2d 987, 992 (9th Cir. 1986); *Thompson v. Gomes*, 45 F.3d 1365, 1366 (9th Cir. 1995).

Stores, Inc., 527 F. Supp. 912, 921 (S.D. Ohio 1981); *Cantor v. Detroit Edison Co.*, 86 F.R.D. 752, 762-63 (E.D. Mich. 1980). This case is properly evaluated in the latter category. Petitioners accepted a Rule 68 offer of judgment which by its terms waived their rights to fees and costs incurred, for any reason, after the date of the offer.

The purpose of Rule 68 is to encourage settlement and its application is entirely appropriate in civil rights cases. *Marek v. Chesny*, 473 U.S. 1, 10-11 (1985); *see also, Herrington v. County of Sonoma*, 12 F.3d 901, 907 (9th Cir. 1993). Rule 68 cuts off the award of fees incurred after an offer of judgement, regardless of whether they are merits fees or "fees on fees."[3] *Lang v. Gates*, 36 F.3d 73 (9th Cir 1994).

There are two basic scenarios that may result after an offer of judgment. If the offer is declined, the analysis focuses on whether the plaintiff ultimately recovers less than the offer. If the plaintiff recovers less than the rejected offer, the plaintiff's right to attorney fees is cut off past the date of the offer. Plaintiff will only get fees for work done prior to the offer; plaintiff gets no fees for work done after the offer, whether on the merits or in litigating the fees. The present case is different, as it deals with an accepted offer of judgment.

If the offer is accepted, the offer is treated like a contract and read as such. *Herrington v. County of Sonoma*,

---

[3] "Fees on fees" is a term often used to characterize litigation concerning the amount of attorney fees. For case law supporting the operation of Fed. R. Civ. P. 68 *see, e.g., Lang v. Gates*, 36 F.3d 73 (9th Cir. 1994).

12 F.3d at 907. The terms of the offer control ultimate resolution of the issues, and a reviewing court will only resort to Rule 68 or other mechanisms when the terms of the offer are ambiguous. *Erdman v. Cochise County Ariz.*, 926 F.2d 877, 890 (9th Cir. 1991). There is no authority holding that an offering defendant can not limit attorney fees to the pre-offer period. Instead, existing authority suggests that the courts will uphold a clear limitation on attorney fees and costs.[4]

In this case, the terms of the offers were clear. The offers were twofold. First, petitioners would receive a certain sum of money plus the costs and fees incurred prior to the date of the offer. Second, the amount of reasonable costs and fees would be set by the court, in its discretion, after the submission of attorney fees by petitioners.

I. There is no conflict between the circuits on the issues presented on appeal.

Petitioners begin by arguing that fee shifting is a critical part of civil rights statutory law guaranteeing civil rights plaintiffs access to the judicial process. However, the bulk of Petitioners' arguments and cited case law deals with *rejected* Rule 68 offers. Petitioners in this action

---

[4] In addition to the cases cited herein, *see Jones v. Federated Department Stores, Inc.*, 527 F. Supp. 912 (S.D. Ohio 1981); *Witcher v. Town of Matthews*, 136 F.R.D. 582 (W.D. N.C. 1991); *Said v. Virginia Commonwealth University*, 130 F.R.D. 60 (E.D. Va. 1990); *Muckleshoot Tribe v. Puget Sound Power & Light*, 875 F.2d 695 (9th Cir. 1989).

accepted the Rule 68 offers of judgment and are bound by the terms of the offers.

It is inconsequential that courts have generally encouraged fee recovery for efforts aimed at recovering attorney fees. Petitioners' Petition 8-9.[5] The offers of judgment at issue unambiguously provided that, if accepted, petitioners would receive a lump sum, plus their costs and fees incurred prior to the offer, and that the court would determine the reasonable amount of costs and fees. This case is factually distinguishable from those cases where plaintiffs were required to litigate fees in the absence of an offer of judgment or when an offer of judgment was rejected.

Moreover, petitioners misstate the circumstances surrounding the post-offer negotiations and ignore this Court's analysis in *Marek v. Chesny*, 473 U.S. 1 (1985). Petitioners assert that, as a result of the Ninth Circuit's decision, civil rights litigation will become extremely unattractive to private practitioners because fees will be diluted as a result of "bad faith" litigation over fees designed to run up costs. Pet. Br. 8, 10. In this case, the terms of the offer mandate quick and easy resolution and do not require any negotiation between the parties. The offer mandates that the court – not the parties – set the amount of costs and fees recoverable. Moreover, the impact of Rule 68 application to civil rights cases has already been addressed and resolved by this Court in *Marek*. 473 U.S. 10-11.

---

[5] Petitioners' petition for writ of certiorari will be hereinafter abbreviated as "Pet. Br."

Petitioners also maintain that inconsistencies exist in the application of Rule 68 in the Fourth and Ninth Circuits, citing the Fourth Circuit's decision in *Trimper v. City of Norfolk*, 58 F.3d 68 (4th Cir. 1995), *cert. denied*, ___ U.S. ___, 133 L.Ed.2d 440 (1995). Any conflicts between the Fourth and Ninth Circuit are imaginary. The court in *Trimper* focused on the general rule that it is within a court's discretion to reduce attorney fees after an offer of judgment has been accepted. 58 F. 3d at 70-77. The Fourth Circuit did not address the impact of acceptance of an offer that unequivocally limits the amount of costs and fees recoverable to those incurred prior to the offer of judgment.

II. Petitioners have not presented any important questions of federal law or statutory construction for resolution.

Petitioners also seek review by asserting that their claim involves "proper application of canons of statutory construction to the federal rules of civil procedure." Pet. Br. 12. Petitioners' arguments in this portion are tautological and admittedly lack judicial authority. Pet. Br. 13.

The last sentence of Rule 68 allows defendants in a bifurcated trial, after the resolution of the first portion, to make an offer of judgment which will have the same effect as if the offer of judgment had been made before trial. Fed. R. Civ. P. 68.

Petitioners' emphasis on the last sentence of Rule 68 is puzzling because that sentence deals with *rejected*

offers. Nevertheless, petitioners assert that the last sentence of Rule 68 applies, and in fact, mandates a different result. Petitioners seem to be arguing that defendants have two options, either they specify an exact amount of attorney fees recoverable, or they submit a second offer of judgment to cut off fees and costs.

Rule 68 offers of judgment need not specify an exact amount for costs and attorney fees; the fees may be determined by a court. Defendants can "choose whether to make an all-inclusive lump-sum offer or name a damages figure and allow fees to be added later." *Erdman v. Cochise County Ariz.*, 926 F.2d at 880 (citing *Marek*, 473 U.S. at 6 ("it is immaterial whether the offer recites that costs are included, whether it specifies the amount * * * or, for that matter, whether it refers to costs at all.")). Adopting petitioners' proposed interpretation would force defendants to include an exact amount of fees and costs, resulting in the imposition of an entirely new duty on defendants.

In the alternative, petitioners assert that defendants should make a second offer for attorney fees and costs to cut off fees and costs. Pet. Br. 13-15. Taking petitioners' arguments to their logical conclusion, defendants could be forced to make endless offers of judgment. The first would set basic liability. The second would set attorney fees, unless of course, the amount of fees-on-fees up to the second offer was disputed. In which case, defendants would have to make a third offer cutting off the fees-on-fees-on-fees. Each successive offer would be ineffective to cut off attorney fees-on-fees unless the parties agreed to a specified amount. This ridiculous result makes petitioners' position indefensible.

III. The Court's decision in *Marek v. Chesny* is not imperilled by the Court's recent decision in *Fogerty v. Fantasy Inc.*

Petitioners assert that this Court's decision in *Fogerty v. Fantasy Inc.*, 510 U.S. ___, 127 L. Ed. 2d 455 (1994) poses a threat to civil rights fee shifting after Rule 68 offers, an issue resolved previously in *Marek v. Chesny, supra.* Petitioners do not, however, explain how *Fogerty* could impact resolution of the issues on appeal.

Petitioners misrepresent any potential impacts of *Fogerty*. To begin, *Fogerty* dealt with a *rejected* offer of judgment and, as such, is factually distinguishable from the issues at hand.

Moreover, assuming *Fogerty* is remotely relevant, Petitioners misstate the possible impact. 17 U.S.C. § 505, the statute at issue in *Fogerty*, is dramatically different in both structure and intent than the civil rights statutes petitioners contend will be affected. *Fogerty v. Fantasy*, 127 L. Ed. 2d at 462-73. As a result, it is unlikely that *Fogerty* will result in the repercussions petitioners advance.

CONCLUSION

The petition should be denied.

DATED this 22nd day of May, 1996.

Respectfully submitted,

LEHNER, MITCHELL, RODRIGUES & SEARS

MICHAEL A. LEHNER
Counsel of Record

95-1700

(1)

Supreme Court, U.S.
FILED
APR 16 1996

No. 95-___

In The

Supreme Court of the United States

October Term, 1995

VIRGINIA ESPINOSA GUERRERO
and MARCOS GUERRERO,

Petitioners,

vs.

WILLIAM CUMMINGS and CITY OF NYSSA,

Respondents.

Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

ROSEN, BIEN & ASARO
SANFORD JAY ROSEN
Counsel of Record
ANDREA G. ASARO
155 Montgomery Street, 8th Floor
San Francisco, California 94104
Telephone (415) 433-6830

SPENCER M. NEAL
GINSBURG, NEAL & LESAGE
500 Yamhill Plaza Bldg.
815 S.W. Second Avenue
Portland, Oregon 97204
Telephone (503) 221-1792

Attorneys for Petitioners

GGPP

QUESTION PRESENTED FOR REVIEW

Whether 42 U.S.C. § 1988 may be modified unilaterally by a defendant's Rule 68 Offer of Judgment to preclude an award of attorneys' fees for post-Offer work to establish "the amount or extent" of defendants' conceded liability for pre-Offer attorneys' fees?

ADDITIONAL PARTIES

Additional plaintiffs, Jesse Estrada and Gabriel Estrada, have settled their claims against defendants in full and were not parties to the appellate proceedings or these proceedings.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED FOR REVIEW i

ADDITIONAL PARTIES ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES . . . . . .

PETITION FOR WRIT OF CERTIORARI 1

OPINIONS BELOW 2

JURISDICTION 2

STATUTORY PROVISIONS INVOLVED 3

STATEMENT OF THE CASE 3

REASONS FOR GRANTING THE PETITION 6

I. THE NINTH CIRCUIT HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW THAT HAS NOT BEEN BUT OUGHT TO BE SETTLED BY THIS COURT AS TO WHICH THERE IS AN APPARENT CONFLICT BETWEEN THE NINTH CIRCUIT'S DECISION HERE AND A RECENT DECISION OF THE FOURTH CIRCUIT 6

II. THIS COURT SHOULD GRANT THE PETITION TO CONSIDER PROPER APPLICATION OF CANONS OF STATUTORY CONSTRUCTION TO THE FEDERAL RULES OF CIVIL PROCEDURE 12

III. THIS COURT SHOULD GRANT THE PETITION IN ORDER TO CONSIDER THE IMPACT OF THE NINTH CIRCUIT'S INTERPRETATION OF RULE 68 ON NON-CIVIL RIGHTS FEE SHIFTING CASES 15

CONCLUSION 17

APPENDIX

Opinion . . . . . App 1

Order dated January 19, 1996 . . . . . App 11

Order dated October 3, 1995 . . . . . App 13

Order dated October 18, 1995 . . . . . App 14

Offer of Judgment in favor of Virginia Espinoza Guerrero dated June 10, 1993 . . . . . App 15

Offer of Judgment in favor of Marcos Albert Guerrero dated June 10, 1993 . . . . . App 18

Acceptance of Rule 68 Offer of Judgment by Plaintiff Virginia

Espinoza Guerrero
dated June 16, 1993 . . . . . App 21

Acceptance of Rule 68 Offer
of Judgment by Plaintiff Marcos
Albert Guerrero dated June 16, 1993 . . . . . App 23

Judgment of Virginia Espinoza
Guerrero dated June 21, 1993 . . . . . App 25

Judgment of Marcos Albert Guerrero
dated June 21, 1993 . . . . . App 26

Findings and Recommendations of
Magistrate Judge Juba
dated August 27, 1993 . . . . . App 27

Order dated October 4, 1993 . . . . . App 33

Order dated October 19, 1993 . . . . . App 35

42 USCA § 1983 - Civil Action
for deprivation of rights . . . . . App 37

42 USCA § 1988 - Proceedings in
vindication of Civil Rights . . . . . App 38

28 USCA Rule 68 - Offer of Judgment . . . . . App 39

TABLE OF AUTHORITIES

Page

CASES

Bernardi v. Yeutter,
951 F.2d 971 (9th Cir. 1991) 10

Blake v. Yackovich,
683 F. Supp. 240 (D. Utah 1988) 9

City of Riverside v. Rivera,
477 U.S. 561 (1986) 15

Commissioner, INS v. Jean,
496 U.S. 154 (1990), ... 8, 11

Crossman v. Marcoccio,
806 F.2d 329 (1st Cir. 1986),
cert. denied, 481 U.S. 1029 (1987) 16

David v. AM Intern.,
131 F.R.D. 86 (E.D. Pa. 1990) 9, 14

Delta Airlines, Inc. v. August,
450 U.S. 346, 67 L. Ed. 2d 287 (1981) 11

Fogerty v. Fantasy Inc.,
510 U.S. ___,
127 L. Ed. 2d 455 (1994) 15, 16

Gagne v. Maher,
594 F.2d 336, 344 (2d Cir. 1979) 8

Guerrero v. Cummings and City of Nyssa,
70 F.3d 1111 (9th Cir. 1995) 2

Hawoth v. State of Nevada,
56 F.3d 1048, 1052 (9th Cir. 1995) 11

Hensley v. Eckerhart,
461 U.S. 424 (1983) 8

Kinney v. International Brotherhood of Electrical Workers,
939 F.2d 690 (9th Cir. 1991) 11

Lang v. Gates,
36 F.3d 73 (9th Cir. 1994) 11

Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit,
507 U.S. 163 (1993) 9

Maher v. Gagne,
448 U.S. 122 (1980) 14

Marek v. Chesny,
473 U.S. 1 (1985) . . . . . *passim*

Thompson v. Gomez,
45 F.3d 1365 (9th Cir. 1995) 11

Trimper v. City of Norfolk, Va.,
58 F.3d 68 (4th Cir. 1995) 9

West Virginia University Hospitals, Inc. v. Casey,
499 U.S. 83 (1991) 9

STATUTES

28 U.S.C.
§ 1254(1) 2
§ 1821 9
§ 1920 9

42 U.S.C.
§ 1983 3
§ 1988 . . . . . i, 6, 7, 9

28 USCA Rule 68 . . . . . *passim*

OTHER

Sutherland Statutory Construction (5th ed. 1992)
§ 46.05 12
§ 67.10 12

Amendments to Rules of Civil Procedure,
Advisory Committee Notes,
reprinted in 39 F.R.D. 69 (1966) 13

No. 95-_____

IN THE SUPREME COURT
OF THE UNITED STATES

October TERM, 1995

VIRGINIA ESPINOSA GUERRERO
and MARCOS GUERRERO

Petitioners,

vs.

WILLIAM CUMMINGS
and CITY OF NYSSA,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioners, Virginia Espinosa Guerrero and Marcos Guerrero, respectfully pray that a Writ of Certiorari issue to review the decision of the United States Court of Appeals for the Ninth Circuit, affirming the decision of the United States District Court for the District of Oregon, that pursuant to Rule 68, Federal Rules of Civil Procedure, their entitlement to attorneys' fees as prevailing civil rights plaintiffs was cut off at the date of Respondents' Offer of Judgment, which Petitioners had accepted.

OPINIONS BELOW

The December 7, 1995 Opinion of the United States Court of Appeals for the Ninth Circuit is reported at 70 F.3d 1111 (9th Cir. 1995). It is reprinted in the Appendix at 1-10. The Ninth Circuit's January 19, 1996 Order denying Petitioner's Petition for Rehearing/ Suggestion of Rehearing *en banc* is not reported. It is reprinted in the Appendix at 11-12. The Ninth Circuit's October 3, 1995 Order submitting this appeal without oral argument is not reported. It is reprinted in the Appendix at 13. The Ninth Circuit's October 18, 1995 Order denying Petitioner's Motion to Reconsider the October 3, 1995 Order is not reported. It is reprinted in the Appendix at 14.

The relevant Rule 68 Offers, the acceptances and the Judgments entered on them by the District Court for the District of Oregon are reprinted in the Appendix at 15-26. The August 27, 1993 Findings and Recommendations of the Magistrate Judge are reprinted in the Appendix at 27-32. The October 4, 1993 Order of the district court is reprinted in the Appendix at 33-34. The October 19, 1993 Order of the district court denying plaintiff's Motion to Reconsider is reprinted in the Appendix at 35-36.

JURISDICTION

This Court has jurisdiction over this case pursuant to 28 U.S.C. § 1254(1). The Judgment of the United States Court of Appeals for the Ninth Circuit was rendered on December 7, 1995. A timely Petition for Rehearing/Suggestion of Rehearing *en banc* was denied on January 19, 1996. This Petition is filed within 90 days therefrom.

STATUTORY PROVISIONS INVOLVED

The text of the relevant portions of Sections 1983 and 1988, Title 42 U.S.C., and of Rule 68 of the Federal Rules of Civil Procedure are included in the Appendix at 37-39.

STATEMENT OF THE CASE

On April 9, 1993, plaintiffs Virginia Guerrero and her son Marcos Guerrero sued defendants William Cummings and the City of Nyssa, Oregon, pursuant to 42 U.S.C. § 1983. The Complaint alleged that Cummings, a sergeant with the Nyssa Police Department, had violated plaintiffs' federal constitutional rights on May 27, 1992. He unlawfully entered the Guerreros' home by kicking open the door, tore the telephone out of the wall to prevent plaintiffs from contacting their attorney or other authorities, and seized Marcos Guerrero. Ninth Circuit Excerpt of Record (hereinafter "ER") 13, 22-23, 56.

On June 10, 1993, defendants made Rule 68 Offers of Judgment to each plaintiff:

> for a total of [$1,500 for Virginia Guerrero and $5,000 for Marcos Guerrero] plus reasonable attorney fees and costs incurred by this plaintiff prior to the date of this offer in an amount to be set by the court.

App. 15-20. These offers were timely accepted by the Guerreros on June 16, 1993. App. 21-24. On June 21, 1993, Judgments were entered in favor of each plaintiff against defendants:

> for [$1500 for Virginia Guerrero and $5000 for Marcos Guerrero] as damages plus [her/his] reasonable attorneys fees and costs as determined by the Court.

App. 25-26.

Subsequently, plaintiffs attempted to reach agreement with defendants on the amount of plaintiffs' "reasonable attorneys' fees." Plaintiffs provided defendants with their attorney's billing records and notified defendants in advance that plaintiffs intended to file a fee petition if agreement could not be reached. ER 20-21. Defendants refused plaintiffs' attempt to settle the amount of pre-Offer attorneys' fees. Their only explanation was that they felt the fees sought for plaintiff's attorney were "a little high," without specifying in what way or making a fees settlement offer either privately or pursuant to Rule 68. ER 15, 20.

As a result, plaintiffs were compelled to file a fully documented and substantiated attorneys' fees petition in district court. In the fee petition, plaintiffs sought compensation for 42.2 hours of pre-Offer work, for a total of $8,440; plaintiffs also claimed compensation for 10.1 hours spent working on the fee petition. ER 21. Plaintiffs subsequently filed a supplemental fee petition on August 2, 1993, seeking fees for an additional 6.2 hours of work performed by plaintiff's attorney in connection with the fee petition. Altogether, the total fees sought were $11,700; $8,440 for pre-Offer work, and $3,260 for the post-Offer fee petition work.

Defendants opposed plaintiffs' fee petition. Defendants argued that only fees incurred up to the date of the Offers of Judgment should be awarded, and the amount awarded should be considerably less than the amount

sought by plaintiffs. Thus, defendants proposed to reduce plaintiffs' attorneys' fees for the pre-Offer work (claimed at $8,440) by $3,220, or 38%. ER 38.

The Magistrate Judge's Findings and Recommendations stated that "[b]ased on [the Offers of Judgments'] language and a review of the relevant arguments by counsel, I find that fees only for time incurred through the date of the June 10, 1993 offer, or 42.2 hours, should be allowed." App. at 30. The Magistrate Judge recommended a total award of $7,385 for that time, thereby reducing the pre-Offer fees claimed by only $1055. *Id.* at 32.

The Magistrate Judge's Findings and Recommendations were adopted in full by the district court. App. at 33-34 . The district court gave no additional reasons for its decision to disallow all fees claimed for work done in connection with plaintiffs' mostly successful litigation to establish the amount of the "reasonable attorney fees and costs incurred . . . prior to the date of [the Rule 68 Offers]. . . ." *See* App. at 30 (Magistrate's Findings). Plaintiffs' timely motion for reconsideration was denied by the district court. App. 35-36.

The Ninth Circuit submitted the case without oral argument, denying a Motion to Reconsider such submission. App. at 13-14. It then affirmed the district court on December 7, 1995, holding that under this Court's decision in *Marek v. Chesny*, 473 U.S. 1 (1985), defendants' Rule 68 Offer effectively cut off plaintiffs' claim for any post judgment fees. App. at 7. The Ninth Circuit held that under *Marek*, the terms of a Rule 68 Offer rather than the terms of Rule 68 itself control whether a fees cut-off has been effectuated as of the date of the Offer, even though the Offer by its terms requires further proceedings to

determine the "amount or extent of [defendants'] liability" for pre-Offer attorneys' fees. App. at 9.

A timely Petition for Rehearing/ Suggestion of Rehearing *en banc* was denied on January 19, 1996. App. at 11-12.

REASONS FOR GRANTING THE PETITION

I. THE NINTH CIRCUIT HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW THAT HAS NOT BEEN BUT OUGHT TO BE SETTLED BY THIS COURT AS TO WHICH THERE IS AN APPARENT CONFLICT BETWEEN THE NINTH CIRCUIT'S DECISION HERE AND A RECENT DECISION OF THE FOURTH CIRCUIT.

In this case, defendants' Rule 68 Offers of Judgment provided for "attorney fees and costs incurred by [ ] plaintiff[s] prior to the date of this offer *in an amount to be set by the court.*" (Emphasis added.) App. 15-16, 18-19. At issue in this case, therefore, is the proper application of Rule 68's punitive cost and fee cut-off mechanism to a plaintiff's claim for attorneys' fees for post-Offer work to establish the extent or amount of defendants' liability for plaintiffs' attorneys' fees under 42 U.S.C. § 1988.

Consideration of the issue involves proper construction of Rule 68, and application of the last sentence of Rule 68, which provides that:

> At any time more than 10 days before the trial begins, a party defending against a claim may serve upon the adverse party an offer to allow judgment to be taken against

> the defending party for the money or property or to the effect specified in the offer, with costs then accrued. . . . When the liability of one party to another has been determined by verdict or order or judgment, but the amount or extent of the liability remains to be determined by further proceedings, the party adjudged liable may make an offer of judgment, which shall have the same effect as an offer made before trial if it is served within a reasonable time not less than 10 days prior to the commencement of hearings to determine the amount or extent of liability.

App. at 39.

The research by both of the courts below and counsel for both parties identified *no* appellate or trial court decision that squarely addresses the impact of the last sentence of Rule 68, where defendants' Rule 68 Offer does not "establish the amount or extent" of attorneys' fees offered. Significantly, as well, this Court has not addressed the application of Rule 68 to a civil rights plaintiff's attorneys' fees claim since its seminal decision in *Marek v. Chesney*, 473 U.S. 1 (1985), in which it analyzed Rule 68 (and its policy favoring settlement) in tandem with 42 U.S.C. § 1988 (the Civil Rights Attorneys Fees Award Act).

In *Marek*, this Court only held that Rule 68's punitive cost cut-off mechanism applied to attorneys' fee claimed under Section 1988, when a plaintiff rejected a Rule 68 Offer and did not do better later. The Court did *not* analyze or pass on the manner of Rule 68's application to, or its implications for, claims for plaintiff's fees

incurred to establish the amount or extent of a defendant's liability for plaintiff's pre-Offer fees, when a civil rights plaintiff has accepted the Offer. Nor did the Court have occasion to consider the impact of the last sentence of Rule 68 in such cases.

The underlying purpose of Section 1988 is to ensure "'effective access to the judicial process' for persons with civil rights grievances." *Hensley v. Eckerhart*, 461 U.S. 424, 429 (1983) (quoting H.R. Rep. No. 94-1558, p. 1 (1976)). To ensure this access to the judicial process, courts rightfully have been very protective of prevailing plaintiffs' rights to attorneys' fees under Section 1988 and similar statutes.

One important component of civil rights statutory fee shifting is the requirement that losing defendants pay all of the reasonable fees incurred by civil rights claimants, including fees for plaintiff's work to litigate the issue of fees. To do otherwise would dilute the fee award, making civil rights litigation extremely unattractive to private practitioners. *See, Commissioner, INS v. Jean*, 496 U.S. 154, 162 (1990) ("[D]enying attorneys' fees for time spent in obtaining them would 'dilute the value of a fees award by forcing attorneys into extensive, uncompensated litigation in order to gain any fees,'" *citing "cf." and quoting Gagne v. Maher*, 594 F.2d 336, 344 (2d Cir. 1979), *aff'd on other grounds*, 448 U.S. 122 (1980); *id.* 496 U.S. at 161-62 (1990) ("the EJA -- like other fee-shifting statutes -- favors treating a case as an inclusive whole rather than as atomized line-items"); *Hensley*, 461 U.S. at 435 (plaintiff is entitled to fees for all hours reasonably devoted to the litigation).

Without reliance on the last sentence of Rule 68 or considerable analysis, several courts (including the Fourth

Circuit) have harmonized Rule 68 with congressional civil rights attorneys' fee shifting policies by awarding post-Rule 68 Offer attorneys' fees in situations comparable to the present case. *See Trimper v. City of Norfolk, Va.*, 58 F.3d 68 (4th Cir. 1995), *cert. denied*, ___ U.S. ___, 133 L. Ed. 2d 440 (1995) (awarding fees-on-fees even though the Rule 68 Offer was for $100 plus costs and expenses incurred to date including attorneys' fees); *David v. AM Intern.*, 131 F.R.D. 86, 88-89 (E.D. Pa. 1990) ("all costs properly awardable in an action are to be considered within the scope of Rule 68 'costs'"; the prevailing plaintiff is entitled to fees and costs incurred in opposing defendant's challenge to fee-petition amounts which asserted that the Rule 68 Offer included fees); *Blake v. Yackovich*, 683 F. Supp. 240, 241, 244-45 (D. Utah 1988) (subsequent to plaintiff's accepting a Rule 68 Offer that included "accrued costs," defendants were held liable for prevailing plaintiff's attorneys' time spent preparing and defending the fees requested in initial, second and third billings). These cases reflect a nascent conflict with the Ninth Circuit's decision here, over proper application of Rule 68 in circumstances like the one presented here.

Application here of Rule 68, in light of 42 U.S.C. § 1988, is fraught with serious consequences for federal law; it involves fundamental issues of interpretation of federal statutes and the Federal Rules of Civil Procedure that are ripe for this Court's dispositive consideration. *See, e.g., Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 122 L. Ed. 2d 517 (1993) (Notice pleading is sufficient under F.R. Civ. P. Rule 8(a) to allege municipal liability in a Section 1983 lawsuit); *West Virginia University Hospitals, Inc. v. Casey*, 499 U.S. 83 (1991) (As Section 1988 does not specifically override 28 U.S.C. §§ 1821 and 1920, which specify the

amount to be recovered for witness fees, civil rights plaintiffs may recover only those statutory cost amounts for their expert witnesses not actual costs).

The monetary amounts involved here are not substantial. However, in many cases the post-Offer fees for fees could be very substantial. *See. e.g., Bernardi v. Yeutter*, 951 F.2d 971 (9th Cir. 1991) (fees and expenses for fees litigation [not involving fees for appellate work] came to approximately $80,000). Moreover, what happened here is illustrative of what can happen in all cases. Defendants engaged in bad faith negotiations over plaintiffs' pre-offer fees, making no counter-offer to plaintiffs' demand. Plaintiffs then had to file a fee application, and were awarded all but a fraction of the pre-Offer fees they sought.

By contrast with *Marek*, the Ninth Circuit here appears to have ignored the plain meaning of Rule 68 as a whole, and construed Rule 68 in a manner that is more likely to discourage than encourage settlements. Civil rights plaintiffs and their attorneys now will tend to reject many Rule 68 Offers that they might otherwise have accepted because they will not want to risk or will be unable reasonably to project the attorneys' fees short fall that could result if a hotly contested post-judgment fee application has to be prosecuted. They will be unwilling to risk having their attorneys' fees so attenuated. Many will prefer to shoot crap. As a consequence, more court time is likely to be taken up addressing fee applications, because civil rights defendants will (as in the instant case) be encouraged to take unduly harsh positions in negotiating the amount of the pre-Offer fees. Defendants will, after all, risk only their own attorneys' fees for the post-Offer work.

Rule 68 already is a defendants' weapon; it provides no reciprocal opportunity to plaintiffs to make cost-shifting offers of judgment. *See Delta Airlines, Inc. v. August*, 450 U.S. 346, 350-51, 67 L. Ed. 2d 287 (1981). It already deters plaintiffs from rejecting reasonable offers of judgment. *See Marek*, 473 U.S. at 11; *Lang v. Gates*, 36 F.3d 73, 76 (9th Cir. 1994), *cert. denied*, ___ U.S. ___, 130 L. Ed. 2d 494 (1994). The Ninth Circuit's interpretation of Rule 68 makes that deterrent downright draconian.

In addition to Rule 68, civil rights defendants and the courts already have ample additional powers to protect defendants when civil rights plaintiffs unreasonably litigate their fees claims. *See Commissioner, INS v. Jean*, 496 U.S. 154, 163 (1990) ("Exorbitant, unfounded, or procedurally defective fee applications -- like any other improper position that may unreasonably protract proceedings -- are matters that the district court can recognize and discount."); *Thompson v. Gomez*, 45 F.3d 1365 (9th Cir. 1995) (district court has discretion to reduce fee-for-fee award by the same percentage that the merits fee claim has been reduced); *Kinney v. International Brotherhood of Electrical Workers*, 939 F.2d 690, 695 (9th Cir. 1991) (stating "[t]he concern that awarding fees for fee litigation will lead to abuse is . . . groundless. Exorbitant fee claims can and will be rejected in the exercise of the court's broad discretion."). *See also Hawoth v. State of Nevada*, 56 F.3d 1048, 1052 (9th Cir. 1995) (when plaintiff rejects Rule 68 Offer that cannot act as a fees cut-off, the "reasonableness of attorney fee award under the FLSA will depend, at least in part on the district court's consideration of the results the plaintiff obtained by going to trial compared to the Rule 68 offer").

It has been more than ten years since this Court construed Rule 68 and applied its punitive mechanism to plaintiffs' attorneys' fees. *Marek v. Chesny*, 473 U.S. 1 (1985). It is appropriate in this case for the Court to revisit Rule 68 in the civil rights attorneys' fees context.

II. THIS COURT SHOULD GRANT THE PETITION TO CONSIDER PROPER APPLICATION OF CANONS OF STATUTORY CONSTRUCTION TO THE FEDERAL RULES OF CIVIL PROCEDURE.

A basic tenet of statutory construction is that each part of a statute must be construed in connection with every other part so as to produce a rational whole. *See, generally, Sutherland Statutory Construction*, §46.05 at 103 (5th ed. 1992). Such principles apply to the judicially promulgated Federal Rules of Civil Procedure just as they apply to legislatively enacted statutes. *See Marek*, 473 U.S. at 9-10; *Sutherland*, §67.10 at 87.

In this case, the Court should decide whether in assessing the affect of such a Rule 65 Offer, under established principles of construction, the last sentence of Rule 68 (quoted on pages 6-7 above) must be read together with the first sentence, such that the two parts function together as an harmonious whole. The first sentence of Rule 68 states:

> At any time more than 10 days before the trial begins, a party defending against a claim may serve upon the adverse party an offer to allow judgment to be taken against the defending party for the money or property or to the effect specified in the offer, with costs then accrued.

Read together with the first sentence of Rule 68, the last sentence would thus create a mechanism for using Rule 68's pro-settlement device, consistent with the one laid out in the first sentence, in cases where issues of liability and damages (or attorneys' fees) are litigated in bifurcated proceedings, with liability already determined by an Offer of Judgment, and the amount of damages (or attorneys' fees) yet to be determined in subsequent proceedings.

The Advisory Committee's Note, written in 1966, when the last sentence was appended to Rule 68, suggests such an interpretation of the last sentence: "This logical extension of the concept of offer of judgment is suggested by the common admiralty practice of determining liability before the amount of liability is determined." *Amendments to Rules of Civil Procedure, reprinted in* 39 F.R.D. 69, 126 (1966). The last sentence has broad application across many categories of cases involving liquidation of all kinds of monetary sums, such as intellectual property infringement, employment discrimination and police misconduct cases. It is frequent practice to hold bifurcated -- and even trifurcated -- proceedings in all such cases, first trying issues of liability and then damages, and then determining attorneys' fees.

In fact, civil rights defendants often use the last sentence of Rule 68 after settlement or judicial determination of the underlying case, when the only issue remaining is plaintiffs' attorneys' fees. In those circumstances, which so far have evaded reported decision, civil rights defendants use the date of the hearing of the fee application as the "trial" date.

In this case, plaintiffs' prevailing party status and defendants' liability to plaintiffs for "reasonable attorneys' fees" were fixed when the Rule 68 Offers were accepted

and judgment was entered in favor of plaintiffs. *David v. AM Intern*, 131 F.3d 86, 89 (E.D. Pa. 1990) ("There can be no question therefore that by accepting the offer of judgment plaintiff has won 'substantial' relief on 'major' issues and is a prevailing party. . . ."); *cf. e.g., Maher v. Gagne*, 448 U.S. 122, 129 (1980). The *reasonableness* of plaintiffs' claimed attorneys' fees (an inherently factual determination), *i.e.*, "the amount or extent" of defendants' "liability" for such pre-Offer fees, still remained to be determined in a separate proceeding.

Once plaintiffs disclosed their demand for pre-Offer fees, if defendants did not believe that the fees sought by plaintiffs were reasonable, then by applying the last sentence of Rule 68, defendants could have made an additional Rule 68 Offer of Judgment to each plaintiff in the fees amount defendants then believed was reasonable. Had defendants made such additional Rule 68 Offers here, plaintiffs would have been put to the choice of either accepting the specified fees offered or proceeding with a fees petition and risking not being compensated for the time spent litigating the fees issue. Alternatively, defendants could have written their original Rule 68 Offers to provide specific sums for damages and specific sums for fees, or even lump sums for all damages, costs and attorneys' fees. *See Marek v. Chesny*, 473 U.S. at 6-7 (1985).

This Court has *not* addressed the situation, presented here, where the defendant makes a specific sum Offer for damages and also offers "costs and attorneys' fees through the date of the offer, in an amount to be determined by the court," and then asserts that Rule 68 cuts off plaintiff's fee claim for work necessarily performed to establish the "amount or extent" of the pre-Offer fees.

This Court should decide whether to deny successful civil rights plaintiffs their fees for litigating fees issues when defendants make Rule 68 Offers that leave unresolved the "amount or extent of [defendants'] liability" for pre-offer fees, and then make low-ball offers to settle the amount of those fees, forces civil rights plaintiffs to litigate the amount of pre-offer fees, thereby rewarding defendants for their intransigence. *See, City of Riverside v. Rivera*, 477 U.S. 561, 580 n. 11 (1986) (civil rights defendants may not litigate aggressively and then assert that plaintiff's attorneys' fees for responding are excessive).

This Court should decide whether the last sentence of Rule 68 should apply to all cases involving bifurcated proceedings including those cases where the second (post-liability determination) proceeding involves litigation over the amount of plaintiffs' attorneys' fees.

III. THIS COURT SHOULD GRANT THE PETITION IN ORDER TO CONSIDER THE IMPACT OF THE NINTH CIRCUIT S INTERPRETATION OF RULE 68 ON NON-CIVIL RIGHTS FEE SHIFTING CASES.

This Court's decision in *Marek* has *not* resolved the issues involved here, especially in light of the Court's subsequent decision in *Fogerty v. Fantasy Inc.*, 510 U.S. ___, 127 L. Ed. 2d 455 (1994).

In *Fogerty*, speaking for all the Court, the Chief Justice held that by contrast with the situation under private attorney general fee shifting situations, under a private litigant fee shifting statute, the prevailing party -- whether plaintiff or defendant -- is entitled to an award of reasonable attorneys' fees. Under private attorney general fee shifting statutes, a prevailing plaintiff ordinarily is entitled

to such an award; a prevailing defendant is not unless the losing plaintiff has been guilty of vexatious or frivolous conduct. *See Fogerty*, 127 L. Ed. 2d at 462-66.

In explaining the difference between the private attorney general and private litigant situations, speaking for all the Court except for Justice Thomas, the Chief Justice stated:

> Oftentimes, in the civil rights context, impecunious 'private attorney general' plaintiffs can ill afford to litigate their claims against defendants with more resources. Congress sought to redress this balance in part, and to provide incentives for the bringing of meritorious lawsuits, by treating successful plaintiffs more favorably than successful defendants in terms of the award of attorney's fees.

Id. at 464.

This principle is already at large in Rule 68. A civil rights plaintiff who does not beat a rejected Rule 68 offer does not pay defendants' attorneys' fees. *See Crossman v. Marcoccio*, 806 F.2d 329, 333 (1st Cir. 1986), *cert. denied*, 481 U.S. 1029 (1987), quoting *Marek*, 473 U.S. at 9. Yet, after *Fogerty*, non-civil rights plaintiffs could not rely on that construction of Rule 68. They are thus at even greater risk under the Ninth Circuit's interpretation of Rule 68 than are civil rights plaintiffs. This Court should decide if this enhanced risk is appropriate under Rule 68, which itself harbors no policy choice favoring civil rights plaintiffs over non-civil rights plaintiffs.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be granted.

Dated: April 18, 1996

Respectfully submitted

ROSEN, BIEN & ASARO

By

Sanford Jay Rosen
Counsel of Record

APPENDIX

- Appendix 1 -

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

VIRGINIA ESPINOZA GUERRERO; MARCOS ALBERT GUERRERO,	
	No. 93-36065
Plaintiffs-Appellants,	
	D.C. No. CV-93-00432-JAR
v.	
WILLIAM CUMMINGS; CITY OF NYSSA,	OPINION
Defendants-Appellees	

Appeal from the
United States District Court
for the District of Oregon
James A. Redden, District Judge,
Presiding

Submitted November 16, 1995*/
Portland, Oregon

Filed December 7, 1995

Before: James R. Browning,
Pamela Ann Rymer, and
Thomas G. Nelson, Circuit Judges

Opinion by Judge Rymer

---

*/ The panel unanimously finds this case suitable for decision without oral argument. Fed. R. App. P. 34(a); 9th Cir. R. 34-4.

SUMMARY

Civil Litigation and Procedure/
Attorneys Fees/ Settlements

The court of appeals affirmed district court orders. The court held that where civil rights plaintiffs accepted Fed. R. Civ. P. 68 offers of judgment providing for reasonable attorneys' fees and costs incurred "prior to the date of" the offers, the district court did not err in denying them "fees on fees" for work done by their attorney after they accepted the offers.

Appellants Virginia and Marcos Guerrero brought a civil rights action against appellees William Cummings and the City of Nyssa. Before trial began, Cummings and Nyssa made Rule 68 offers of judgment. The offers provided that Cummings and the City would allow judgment to be given against them in favor of Virginia Guerrero for $1,500 plus "reasonable attorney fees and costs incurred" by the plaintiff "prior to the date of" the offer "in an amount to be set by the court." The Guerreros accepted, and judgment was entered.

The Guerreros' attorney sought to recover costs and fees that included time spent in preparing the bill. The district court awarded pre-settlement costs and fees, but declined to award "fees on fees." The Guerreros appealed.

[1] The Guerreros were incorrect in arguing that the terms of the offers

they accepted did not clearly and unambiguously waive fees on fees. [2] The plain language of the settlement offers limited attorneys' fees to those accrued prior to the date of the offers. Thus, the district court did not err in finding that the Guerreros' acceptance clearly and unambiguously waived attorneys' fees incurred thereafter.

[3] There were no reasons of policy that precluded the cutting off of fees and costs at the point a Rule 68 offer was made and accepted.

[4] Even though there may be a post-offer proceeding, the offer's terms, not those of Rule 68, control the cut-off of attorneys' fees and costs.

COUNSEL

Sanford Jay Rosen, Rosen, Bien & Asaro, San Francisco, California, for the plaintiffs-appellants.

Michael A. Lehner and Edwin A. Skoch, II, Lehner, Mitchell, Rodrigues & Sears, Portland, Oregon, for the defendants-appellees.

OPINION

RYMER, Circuit Judge:

Virginia Espinoza Guerrero and Marcos Guerrero appeal the district court's orders denying them "fees on fees" for work done by their attorney after they accepted Fed. R. Civ. P. 68

offers of judgment that provided for reasonable attorney's fees and costs incurred "prior to the date of" the offers. We have jurisdiction, 28 U.S.C. § 1291, and we affirm.

I

The Guerreros brought a civil rights action under 42 U.S.C. § 1983 against William Cummings and the City of Nyssa. Cummings and Nyssa made Rule 68 offers of judgment prior to the commencement of trial. Except for the dollar amounts and the plaintiffs' names, the offers were identical and provided:

> Pursuant to FRCP 68, defendants hereby allow judgment to be given them in favor of plaintiff, Virginia Espinoza Guerrero, for a total of ONE THOUSAND FIVE HUNDRED AND NO/100 DOLLARS ($1,500), plus reasonable attorney fees and costs incurred by this plaintiff prior to the date of this offer in an amount to be set by the court.

The Guerreros accepted, and judgment was entered in their favor.

Their attorney then sought to recover costs and fees that included time spent in preparing the bill. The district court awarded pre-settlement costs and fees, but declined to award fees on fees on the ground that "the explicit terms of the offers dictate this result."

II

[1] The Guerreros contend that the terms of the offers they accepted do not clearly and unambiguously waive fees on fees. We cannot agree.

As a general rule, "time spent in establishing entitlement to an amount of fees awardable under section 1988 is compensable." *Clark v. City of Los Angeles*, 803 F.2d 987, 992 (9th Cir. 1986) (citations omitted). However, a settlement offer may be conditioned upon the waiver of such fees. *Evans v. Jeff D.*, 475 U.S. 717, 737-38, *reh'g denied*, 476 U.S. 1179 (1986). Accepting such an offer constitutes waiver, but only if the waiver is "clear and unambiguous." *Erdman v. Cochise County, Ariz.*, 926 F.2d 877, 880 (9th Cir. 1991) (citations omitted). The "usual rules of contract construction" apply to interpreting the terms of a Rule 68 settlement offer in an § 1983 case. *Herrington v. County of Sonoma*, 12 F.3d 901, 907 (9th Cir. 1993).

The Guerreros contend that the offers are ambiguous because, by allowing for costs and fees "in an amount to be set by this court," they leave open the possibility that the court will choose to award an amount that includes post-settlement fees. Alternatively, they argue, the language is ambiguous because it could be interpreted to mean that *if* the parties fail to reach an agreement regarding the amount of fees, they will petition the court and, in that event, will be entitled to fees for the time spent on

that effort because the offer is silent as to fees for counsel's efforts involved in those proceedings.

We see nothing ambiguous in these offers. By their own terms, the offers explicitly limit fees and costs to those "*incurred by this plaintiff prior to the date of this offer* in an amount to be set by the court." (Emphasis added). It is the reasonableness of those fees only -- *i.e.*, fees incurred before the offers -- that may be left to the court to determine.

The Guerreros rely on *Holland v. Roeser*, 37 F.3d 501 (9th Cir. 1994), in which the court upheld an award of post-settlement attorney fees. In *Holland*, however, the court found that an offer that provide for "'costs now accrued *and reasonable attorney fees as determined by the court*'" was ambiguous. *Id.* at 504. In the *Holland* offer, the term "now accrued" modified "costs," but did not clearly modify "reasonable attorney fees." Therefore, the offer could be read to mean that while costs would be limited to those "now accrued," attorney fees would not be so limited. In the Guerreros' offers, on the other hand, "incurred prior to this date" modifies "reasonable attorney fees and costs." Both attorney fees and costs are limited to those incurred prior to the date of the offers.

[2] Because the plain language of the settlement offers limits attorney fees to those accrued prior to the date of the offers, the district court did not err in finding that the Guerreros'

acceptance clearly and unambiguously waived attorney fees incurred thereafter.

III

The Guerreros contend that disallowing post-offer fees undermines the attorney's fees policy in civil rights actions. They are concerned that the district court's decision puts plaintiffs in an impossible predicament: either reject an offer of judgment which is reasonable s to the damages but leaves open the attorney's fees, and with the rejection risk the fee-shifting penalties in Rule 68, or accept the Rule 68 offer which cuts off further entitlement to fees no matter how difficult it is to resolve the amount of the pre-offer fee. They also suggest that forcing plaintiffs to litigate the reasonableness of fees, yet depriving them of fees on fees, dilutes the attorney's fees paid for work done on the underlying case.

[3] These arguments fail in light of the Supreme Court's opinion in *Marek v. Chesny*, 473 U.S. 1, 10-11 (1985). As the Court explained, "Merely subjecting civil rights plaintiffs to the settlement provision of Rule 68 does not curtail their access to the courts, or significantly deter them from bringing suit." *Id.* at 10. Moreover, while Rule 68 "will require plaintiffs to 'think very hard' about whether continued litigation is worthwhile[,]" this effect of Rule 68 "is in no sense inconsistent with the congressional policies underlying § 1983 and § 1988." *Id.* at

11. Thus, there are no reasons of policy that preclude the cutting off of fees and costs at the point a Rule 68 offer is made and accepted.

IV

The Guerreros contend that under the language of Rule 68 itself, no Rule 68 offer that leaves open the "amount or extent of [defendant's] liability" for pre-offer attorney's fees should preclude plaintiffs who accepted such an offer from securing reasonable attorney's fees for post-offer work to establish the amount or extent of liability for pre-offer attorney's fees. They rely on the last sentence of the Rule, which provides:

> When the liability of one party to another has been determined by verdict or order of judgment, but the amount or extent of the liability remains to be determined by further proceedings, the party adjudged liable may make an offer of judgment, which shall have the same effect as an offer made before trial ....

Fed.R.Civ.P. 68. As we understand the suggestion, it is that their situation is like the bifurcated trial situation that the last sentence addresses -- in accepting the offer, *liability* for attorney's fees was determined, but the *amount or extent* of those fees remains to be determined in post-offer proceedings.

[4] However, this is beside the point. Even though there may be a post-offer proceeding, the terms of the offer -- not the terms of Rule 68 -- control the cut-off of attorney's fees and costs. *Marek*, 473 U.S. at 6; *Erdman*, 926 F.2d at 800 (citing *Marek*, 473 U.S. at 6). The last sentence in Rule 68 is intended to provide the defendant with a second bite at the apple even though the time limitation for making a judgment offer "ten days before trial has begun" will have expired when the trial of liability and damages is bifurcated. *See* Fed. R. Civ. P. 68 advisory committee's note. Nothing at all analogous obtains here. The last sentence, in conjunction with the rest of the Rule, cannot be stretched to require defendants making a judgment offer in an action with a fee-shifting provision to break their offer in two, such that the first offer that is accepted has to do only with "liability" for fees and that thereafter, a second Rule 68 offer of judgment has to be made with respect to the amount of fees that the defendant believes is reasonable. Accordingly, the last sentence of Rule 68 has no applicability to the Guerreros' case.

V

Finally, the Guerreros seek payment of attorney's fees incurred in the course of pursuing this appeal, under 42 U.S.C. § 1988. Section 1988 permits the award of attorney's fees only to a prevailing party. Because we affirm the district court, the Guerreros are not

prevailing parties and so are not entitled to fees on appeal.

AFFIRMED.

- Appendix 11 -

Filed
Jan 19 1996
Cathy A. Catterson, Clerk
U.S. Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

VIRGINIA ESPINOZA GUERRERO; MARCOS ALBERT GUERRERO,	
Plaintiffs-Appellants,	No. 93-36065
v.	D.C. No. CV-93-00432-JAR
WILLIAM CUMMINGS; CITY OF NYSSA,	ORDER
Defendants-Appellees	

Before: BROWNING, RYMER, and T.G. NELSON, Circuit Judges

The panel has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for en banc rehearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

- Appendix 13 -

Filed
Oct - 3 1995
Cathy A. Catterson, Clerk
U.S. Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

VIRGINIA ESPINOZA GUERRERO; MARCOS ALBERT GUERRERO,	)	
	)	No. 93-36065
Plaintiffs-Appellants,	)	
	)	D.C. No.
v.	)	CV-93-00432-JAR
	)	
WILLIAM CUMMINGS; CITY OF NYSSA,	)	ORDER
	)	
Defendants-Appellees	)	

This case shall be submitted on the briefs and record, without oral argument, on November 16, 1995, in Portland, Oregon. Fed. R. App. P. 34(a), 9th Cir. R. 34-4.

By Direction of the Court

CATHY A. CATTERSON
Clerk of Court

By s/Estela Urrutia
Deputy Clerk

- Appendix 14 -

Filed
Oct - 18 1995
Cathy A. Catterson, Clerk
U.S. Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

VIRGINIA ESPINOZA GUERRERO; MARCOS ALBERT GUERRERO, Plaintiffs-Appellants, v. WILLIAM CUMMINGS; CITY OF NYSSA, Defendants-Appellees	No. 93-36065 D.C. No. CV-93-00432-JAR ORDER

Appellants' motion for reconsideration filed on October 10, 1995, is DENIED.

By Direction of the Court

CATHY A. CATTERSON
Clerk of Court

By s/Estela Urrutia
Deputy Clerk

- Appendix 15 -

Mr. Michael A. Lehner, OSB No. 74188
LEHNER, MITCHELL, RODRIGUES & SEARS
1015 Crown Plaza
1500 SW First
Portland, OR 97201
(503) 226-2225
Attorney for Defendant Cummings

Mr. Carl Burnham, Jr. OSB No. 64008
YTURRI, ROSE, BURNHAM, BENTZ, HELFRICH
PO Box "S"
89 SW Third Ave.
Ontario, OR 97914
Of Attorneys for Defendant City of Nyssa

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

VIRGINIA ESPINOZA GUERRERO, MARCOS ALBERT GUERRERO, JESSE ESTRADA and GABRIEL ESTRADA, Plaintiffs, v. WILLIAM CUMMINGS and the CITY OF NYSSA, Defendants.	Case No. 93-432-JU OFFER OF JUDGMENT

Pursuant to FRCP 68, defendants hereby allow judgment to be given against them in favor of plaintiff, Virginia Espinoza Guerrero, for a total of ONE THOUSAND FIVE HUNDRED AND NO/100

DOLLARS ($1,500), plus reasonable attorney fees and costs incurred by this plaintiff prior to the date of this offer in an amount to be set by the court.

LEHNER, MITCHELL, RODRIGUES & SEARS

s/Michael A. Lehner
Michael A. Lehner, OSB No. 74188
Trial Attorney for Defendant Cummings

YTURRI, ROSE, BURNHAM, BENTZ & HELFRICH

s/Carl Burnham, Jr.
Carl Burnham, Jr. OSB No. 64008
Of Attorneys for Defendant City of Nyssa

The above offer, having been served upon plaintiff on the 10 day of June, 1993, is hereby accepted by plaintiff.

s/Spencer M. Neal
Spencer M. Neal, OSB No. 77286
Attorney for Plaintiff Virginia Guerrero

CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing RULE 68 ACCEPTANCE OF OFFER OF JUDGMENT on the attorneys for defendants by mailing to said attorneys in a sealed envelope with postage prepaid a true copy of said document, which I hereby certify as true, to them at their regular business addresses, to-wit:

Michael A. Lehner
1500 S.W. 1st Ave. #1015
Portland, Oregon 97201

Carl Burnham, Jr.
P.O. Box 8
Ontario, Oregon 97914

on this 16th day of June, 1993, and deposited in the post office at Portland, Oregon, on said day.

s/Spencer M. Neal
Spencer M. Neal
Of Attorneys for Plaintiffs Guerrero

Mr. Michael A. Lehner, OSB No. 74188
LEHNER, MITCHELL, RODRIGUES & SEARS
1015 Crown Plaza
1500 SW First
Portland, OR 97201
(503) 226-2225
Attorney for Defendant Cummings

Mr. Carl Burnham, Jr. OSB No. 64008
YTURRI, ROSE, BURNHAM, BENTZ, HELFRICH
PO Box "S"
89 SW Third Ave.
Ontario, OR 97914
Of Attorneys for Defendant City of Nyssa

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

VIRGINIA ESPINOZA GUERRERO, MARCOS ALBERT GUERRERO, JESSE ESTRADA and GABRIEL ESTRADA, Plaintiffs, v. WILLIAM CUMMINGS and the CITY OF NYSSA, Defendants.	Case No. 93-432-JU OFFER OF JUDGMENT

Pursuant to FRCP 68, defendants hereby allow judgment to be given against them in favor of plaintiff, Marcos Albert Guerrero, for a total of FIVE THOUSAND AND NO/100 DOLLARS

($5,000), plus reasonable attorney fees and costs incurred by this plaintiff prior to the date of this offer in an amount to be set by the court.

LEHNER, MITCHELL, RODRIGUES & SEARS

s/Michael A. Lehner
Michael A. Lehner, OSB No. 74188
Trial Attorney for Defendant
Cummings

YTURRI, ROSE, BURNHAM, BENTZ & HELFRICH

s/Carl Burnham, Jr.
Carl Burnham, Jr. OSB No. 64008
Of Attorneys for Defendant
City of Nyssa

The above offer, having been served upon plaintiff on the 10 day of June, 1993, is hereby accepted by plaintiff.

s/Spencer M. Neal
Spencer M. Neal, OSB No. 77286
Attorney for Plaintiff
Marcos Guerrero

CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing RULE 68 ACCEPTANCE OF OFFER OF JUDGMENT on the attorneys for defendants by mailing to said attorneys in a sealed envelope with postage prepaid a true copy of said document, which I hereby certify as true, to them at their regular business addresses, to-wit:

Michael A. Lehner
1500 S.W. 1st Ave. #1015
Portland, Oregon 97201

Carl Burnham, Jr.
P.O. Box S
Ontario, Oregon 97914

on this 16th day of June, 1993, and deposited in the post office at Portland, Oregon, on said day.

s/Spencer M. Neal
Spencer M. Neal
Of Attorneys for Plaintiffs Guerrero

Spencer M. Neal- OSB# 77286
GINSBURG & NEAL
500 Yamhill Plaza Avenue
815 S.W. Second Avenue
Portland, Oregon 97204
(513) 221-1792

Of Attorneys for Plaintiffs Guerrero

Tom Steenson- OSB# 74313
STEENSON & SCHUMANN
500 Yamhill Plaza Avenue
815 S.W. Second Avenue
Portland, Oregon 97204
(513) 221-1792

Of Attorneys for Plaintiffs Estrada

Manuel Perez- OSB# 81452
OREGON LEGAL SERVICES CORPORATION
772 N. Oregon Street
Ontario, Oregon 97914-1727
(513) 889-3121

Of Attorneys for All Plaintiffs

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

VIRGINIA ESPINOZA GUERRERO, et al.	Civil No. 93-432 JU
Plaintiffs, vs.	ACCEPTANCE OF RULE 68 OFFER OF JUDGMENT BY
WILLIAM CUMMINGS et al.	PLAINTIFF VIRGINIA ESPINOZA GUERRERO
Defendants.	

- Appendix 22 -

Pursuant to Rule 68 of the Federal Rules of Civil Procedure, plaintiff Virginia Espinoza Guerrero accepts the offer of judgment of defendants Cummings and City of Nyssa, a copy of which is attached hereto.

DATED this 16th day of June, 1993.

s/Spencer M. Neal
Spencer M. Neal
Of Attorneys for Plaintiffs Guerrero

Spencer M. Neal- OSB# 77286
GINSBURG & NEAL
500 Yamhill Plaza Avenue
815 S.W. Second Avenue
Portland, Oregon 97204
(513) 221-1792

Of Attorneys for Plaintiffs Guerrero

Tom Steenson- OSB# 74313
STEENSON & SCHUMANN
500 Yamhill Plaza Avenue
815 S.W. Second Avenue
Portland, Oregon 97204
(513) 221-1792

Of Attorneys for Plaintiffs Estrada

Manuel Perez- OSB# 81452
OREGON LEGAL SERVICES CORPORATION
772 N. Oregon Street
Ontario, Oregon 97914-1727
(513) 889-3121

Of Attorneys for All Plaintiffs

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

VIRGINIA ESPINOZA GUERRERO, et al.	)	Civil No. 93-432 JU
Plaintiffs,	)	
vs.	)	ACCEPTANCE OF RULE 68 OFFER OF JUDGMENT BY PLAINTIFF GUERRERO
WILLIAM CUMMINGS et al.	)	
Defendants.	)	

- Appendix 24 -

Pursuant to Rule 68 of the Federal Rules of Civil Procedure, plaintiff Marcus Albert Guerrero accepts the offer of judgment of defendants Cummings and City of Nyssa, a copy of which is attached hereto.

DATED this 16th day of June, 1993.

s/Spencer M. Neal
Spencer M. Neal
Of Attorneys for Plaintiffs Guerrero

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

VIRGINIA ESPINOZA GUERRERO, MARCOS ALBERT GUERRERO, JESSE ESTRADA and GABRIEL ESTRADA, Plaintiffs, v. WILLIAM CUMMINGS and the CITY OF NYSSA, Defendants.	Case No. 93-432-JU JUDGMENT

IT IS HEREBY ORDERED AND ADJUDGED that plaintiff Virginia Espinoza Guerrero have judgment, jointly and severally, against defendants William Cummings and the City of Nyssa for the sum of $1,500.00 as damages plus her reasonable attorneys fees and costs as determined by the Court.

Dated this 21 day of June, 1993.

s/ James A. Redden
United States District Judge

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

VIRGINIA ESPINOZA GUERRERO, MARCOS ALBERT GUERRERO, JESSE ESTRADA and GABRIEL ESTRADA, Plaintiffs, v. WILLIAM CUMMINGS and the CITY OF NYSSA, Defendants.	Case No. 93-432-JU JUDGMENT

IT IS HEREBY ORDERED AND ADJUDGED that plaintiff Marcos Albert Guerrero have judgment, jointly and severally, against defendants William Cummings and the City of Nyssa for the sum of $5,000.00 as damages plus his reasonable attorneys fees and costs as determined by the Court.

Dated this 21 day of June, 1993.

s/ James A. Redden
United States District Judge

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

VIRGINIA ESPINOZA GUERRERO, et al.,	Case No. 93-432-JU
Plaintiffs,	FINDINGS AND RECOMMENDATION
v.	
WILLIAM CUMMINGS, et al.,	
Defendants.	

SPENCER M. NEAL
GINSBURG & NEAL
500 Yamhill Plaza Bldg.
815 S.W. Second Avenue
Portland, Oregon 97204
Telephone (503) 221-1792

Of Attorney for Plaintiffs

Michael A. Lehner
Lehner, Mitchell,
Rodriguez & Sears
1015 Crown Plaza
1500 S.W. First
Portland, Oregon 97201

Of Attorneys for Defendants

JUBA, Magistrate Judge:

INTRODUCTION

This action was filed on April 9, 1993. Plaintiffs, Virginia Guerrero, Marcos Guerrero, Jesse Estrada, and Gabriel Estrada brought actions against defendants William Cummings and the City of Nyssa under 42 U.S.C. § 1983. The complaint alleged that plaintiffs' constitutional rights were violated in May, 1992, when Cummings, a sergeant with the Nyssa Police Department, entered the home of and seized one of the Guerrero plaintiffs unlawfully. The complaint further alleged that during this same incident, Cummings maliciously sprayed the Estrada plaintiffs with Capstun.

Plaintiffs' fee petition (docket #20) and plaintiffs' supplemental fee petition (docket #31) are now before me.

STANDARDS

The calculation of attorney fee awards begins with the lodestar figure, *i.e.*, "'the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate.'" *Miller v. Los Angeles County Bd. of Education*, 827 F.2d 617, 621 (9th Cir. 1987) (quoting *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 106 S. Ct. 3088, 3097 (1986)). Although a strong presumption exists that the lodestar figure represents a reasonable fee, the figure can be adjusted based on the factors enunciated in *Kerr v. Screen Extras Guild, Inc.*, 526 F.2d 67, 70 (9th Cir. 1975), *cert. denied*, 425 U.S. 951 (1976).

The *Kerr* factors are: (1) time and labor required; (2) the novelty and difficulty of the questions; (3) the skill requisite to perform the legal service properly; (4) the preclusion of other employment by the attorney due to acceptance of the case; (5) the customary fee; (6) whether the fee was fixed or contingent; (7) time limitations imposed by the client or the circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation and ability of the attorney; (10) the "undesirability" of the case; (11) the nature and length of the professional relationship with the clients; and (12) awards in similar cases. *Id.* This court also considers whether or not counsel acted expeditiously and professionally. Only those factors most relevant to this case need be considered. *See Quesada v. Thomason*, 850 F.2d 537, 539 (9th Cir. 1988).

DISCUSSION

The Guerrero plaintiffs initially sought assistance from Manuel Perez of the Oregon Legal Services Corporation in Ontario, Oregon. In addition, Guerrero plaintiffs retained Spencer Neal to represent them, and the Estrada plaintiffs retained Tom Steenson. All attorney fee issues except those remaining between the Guerrero plaintiffs (as represented by Spencer Neal) and defendants have been resolved.

In June of 1993, this case was settled after the defendants made offers of settlement under Fed. R. Civ. P. 68.

Those settlements resulted in judgments in favor of the Guerrero plaintiffs of $5,000.00 to plaintiff Marcos Guerrero and $1,500.00 to plaintiff Virginia Guerrero. Spencer Neal now seeks a total of $11,700.00 in attorney fees. This total figure represents 58.5 hours of work at $200.00 per hour. Of that amount, $8,440.00 (42.2 hours) was incurred prior to the filing of the fee petition, and $3,260.00 (16.3 hours) is for work done in connection with the fee petition.

Defendants do not dispute that plaintiffs are entitled to an award of fees under 42 U.S.C. § 1988. However, they do object to the amount of the fee award requested and contend that both the hourly rate and time incurred in this action are unreasonable.

The offers of judgment accepted by Guerrero plaintiffs were for a stated sum "plus reasonable attorney fees and costs incurred by [the] plaintiff prior to the date of [the] offer in an amount to be set by the court." *See* Acceptance of Rule 68 Offers of Judgment and attachments (docket nos. 12 and 13). Based on this language and a review of the relevant arguments by counsel, I find that fees only for time incurred through the date of the June 10, 1993 offer, or 42.2 hours, should be allowed.

The defendants also contest the request for $200.00 per hour. I have reviewed the submissions of both sides in light of the presumption afforded the lodestar figure as well as the *Kerr* factors. Counsel for the plaintiffs

submitted several affidavits from attorneys in support of the requested hourly rate. However, the majority of those affidavits are from attorneys who specialize in areas other that the area involved in this case, or in which counsel for the plaintiffs specializes. I therefore do not find the submitted affidavits controlling.

In addition, I have reviewed the pleadings and the billing statements filed in this matter. Under *Kerr*, consideration may be given to (1) the time and labor required, (2) the novelty and difficulty of the questions, (3) the skill requisite to perform the legal service properly, (4) the customary fee, (5) the amount involved and the results obtained, (6) the nature and length of the professional relationship with the clients, and (7) awards in similar cases. After reviewing the pleadings and billing statements, I am not convinced that, at least in this case, these factors justify an award of $200.00 per hour. At least some of the tasks which are billed at this rate are tasks which do not require the attention of an attorney, let alone one whose time is so valuable. This is particularly true in a case where the factual background is straightforward and serious efforts are being made at settlement. I will not attempt to itemize each entry in the billing records and set a fee for each. Instead, I find that it would be appropriate to award a fee of $175.00 per hour for all of the allowed hours and put this matter to rest.

CONCLUSION

For the reasons stated above, plaintiffs' fee petition (docket #20), and plaintiffs' supplemental fee petition (docket #22) should be GRANTED IN PART AND DENIED IN PART. No award of fees should be allowed in connection with counsels' work on the fee petitions and counsel for the Guerrero plaintiffs, Spencer M. Neal, should be awarded a total of $7,385.00 (42.2 hours at $175.00 per hour) for his work on this case.

Dated this 27th day of August, 1993.

/s/United States Magistrate Judge

- Appendix 33 -

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

VIRGINIA ESPINOZA GUERRERO, et al.	)	Civil No. 93-432
	)	93 - 432 JU
Plaintiffs,	)	
	)	O R D E R
vs.	)	
	)	
WILLIAM CUMMINGS et al.	)	
	)	
Defendants.	)	

REDDEN, Judge:

Magistrate Judge Juba filed his Findings and Recommendation on August 27, 1993. The matter is now before me pursuant to 28 U.S.C. § 636(b)(1)(B) and Fed. R. Civ. P. 72(b).

When a party objects to any portion of the Magistrate's Findings and Recommendation, the district court must make a *de novo* determination of that portion of the Magistrate's report. 28 U.S.C. § 636(b)(1)(B); *McDonnell Douglas Corp. v. Commodore Business Machines*, 656 F.2d 1309, 1313 (9th Cir. 1981), *cert. denied*, 455 U.S. 920 (1982).

Plaintiffs have timely filed objections. I have, therefore, given the file of this case a *de novo* review. I ADOPT the Magistrate's Findings and Recommendation that Plaintiffs be awarded a total of $7,385.00 (42.2 hours at $175 per hour) in attorney's fees for the services of Spencer M. Neal performed before the filing of the fee petition. *See Cabrales v. County of Los Angeles*, 864 F.2d 1454, 1465 (9th Cir. 1988), *vacated on other grounds*, 490 U.S. 1087 (1989), *reinstated*, 886 F.2d 235 (9th Cir. 1989), *cert. denied*, 494 U.S. 1091 (1990).

IT IS SO ORDERED.

Dated this 4 day of October, 1993.

s/James A. Redden
JAMES A. REDDEN
United States District Judge

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

VIRGINIA ESPINOZA GUERRERO, et al.	)	Civil No. 93-432
	)	93 - 432 JU
Plaintiffs,	)	
	)	O R D E R
vs.	)	
	)	
WILLIAM CUMMINGS et al.	)	
	)	
Defendants.	)	

REDDEN, Judge:

Plaintiffs Guerrero move for reconsideration of the Order adopting the Magistrate's Findings and Recommendations relating to an award of attorney's fees. The motion is denied for the following reasons.

Plaintiffs argue that *Cabrales v. County of Los Angeles* is inapposite. Contrary to plaintiffs' belief, this court did not rely on *Cabrales* to suggest that plaintiffs' counsel had enjoyed limited success in this case. Rather *Cabrales* was cited because it notes that a downward percentage adjustment may be made to either the hour or fee component

of the lodestar, so long as a reduction is not calculated twice. *Cabrales v. County of Los Angeles*, 864 F.2d 1454, 1465 (9th Cir. 1988), *vacated on other grounds*, 490 U.S. 1087 (1989), *reinstated*, 886 F.2d 235 (9th Cir. 1989), *cert. denied*, 494 U.S. 1091 (1990).

In this case, the Magistrate chose to reduce the fee rate rather than the number of hours. The reduction produced a reasonable hourly rate of $175.00.

Plaintiffs also object to the denial of fees incurred after they accepted offers of judgment. As the Magistrate found, the explicit terms of the offers dictate this result.

Plaintiff's motion for reconsideration (doc. #39) is denied.

IT IS SO ORDERED.

Dated this 19 day of October, 1993.

s/James A. Redden
JAMES A. REDDEN
United States District Judge

42 U.S.C.A. § 1983. Civil Action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

42 U.S.C.A. § 1988. Proceedings in vindication of civil rights

(b) Attorney's fees

In any action or proceeding to enforce a provision of sections 1981, 1981a, 1982, 1983, 1985 and 1986 of this title, title IX of Public Law 92-318, the Religious Freedom Restoration Act of 1993, Title VI of the Civil Rights Act of 1964, or section 13981 of this title, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

FEDERAL RULES OF CIVIL PROCEDURE

28 U.S.C.A. Rule 68. Offer of Judgment

At any time more than 10 days before the trial begins, a party defending against a claim may serve upon the adverse party an offer to allow judgment to be taken against the defending party for the money or property or to the effect specified in the offer, with costs then accrued. If within 10 days after the service of the offer the adverse party serves written notice that the offer is accepted, either party may then file the offer and notice of acceptance together with proof of service thereof and thereupon the clerk shall enter judgment. An offer not accepted shall be deemed withdrawn and evidence thereof is not admissible except in a proceeding to determine costs. If the judgment finally obtained by the offeree is not more favorable than the offer, the offeree must pay the costs incurred after the making of the offer. The fact that an offer is made but not accepted does not preclude a subsequent offer. When the liability of one party to another has been determined by verdict or order or judgment, but the amount or extent of the liability remains to be determined by further proceedings, the party adjudged liable may make an offer of judgment, which shall have the same effect as an offer made before trial if it is served within a reasonable time not less than 10 days prior to the commencement of hearings to determine the amount or extent of liability.

Supreme Court, U.S.
FILED
MAY 23 1996
CLERK

No. 95-1700

In The

Supreme Court of the United States

October Term, 1995

VIRGINIA ESPINOSA GUERRERO
and MARCOS GUERRERO,

Petitioners,

vs.

WILLIAM CUMMINGS
and CITY OF NYSSA,

Respondents.

On Petition For Writ Of Certiorari
To The Ninth Circuit Court Of Appeals

RESPONDENTS' BRIEF IN OPPOSITION

LEHNER, MITCHELL, RODRIGUES & SEARS
MICHAEL A. LEHNER
Counsel of Record
JENNIFER K. OETTER
1500 SW First, Suite 1015
Portland, Oregon 97201
Telephone: (503) 226-2225

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

18 pp

QUESTION RESTATED

This Court has already held that offers of judgment, made pursuant to Federal Rule of Procedure 68, are appropriate in civil rights cases, including those seeking recovery under 42 U.S.C. § 1988.

The district court and the Ninth Circuit both held that the Rule 68 offers made and accepted in this case, by their clear terms, prohibited recovery of fees, incurred for any reason, after the offers of judgment.

QUESTIONS:

1. Whether this Court should grant certiorari when the petitioners have failed to identify any conflict between circuits or any important question of federal law and where petitioners are only challenging a discretionary ruling by the district court?

2. Whether a party is allowed to ignore the terms of an accepted Rule 68 offer and attempt to recover fees incurred after the offer was accepted, when the terms of the offer were clear and unambiguous?

PARTIES TO THE PROCEEDING

Petitioners Virginia Espinosa Guerrero and Marcos Guerrero ("petitioners") were the plaintiffs and appellants below.

William Cummings and the City of Nyssa ("respondents") were the defendants and appellees below.

TABLE OF CONTENTS

Page

Question Restated i

Parties to the Proceeding ii

Table of Contents iii

Table of Citations iv

Opinions Below 1

Statement of the Case 2

Reasons For Denying the Writ 5

I. There is no conflict between the circuits on the issues presented on appeal 7

II. Petitioners have not presented any important questions of federal law or statutory construction for resolution 9

III. The Court's decision in *Marek v. Chesny* is not imperilled by the Court's recent decision in *Foggerty v. Fantasy Inc* 11

Conclusion 12

TABLE OF CITATIONS

Page

CASES CITED:

Cantor v. Detroit Edison Co., 86 F.R.D. 752 (E.D. Mich. 1980) 6

Chicano Police Officer's Ass'n v. Stover, 624 F.2d 127 (10th Cir. 1980) 5

Clark v. City of Los Angeles, 803 F.2d 987 (9th Cir. 1986) 5

Erdman v. Cochise County Ariz., 926 F.2d 877 (9th Cir. 1991) 7, 10

Evans v. Jeff D., 475 U.S. 717, *reh'g denied*, 476 U.S. 1179 (1986) 5

Fogerty v. Fantasy Inc., 510 U.S. ___, 127 L. Ed. 2d 455 (1994) 11

Herrington v. County of Sonoma, 12 F.3d 901 (9th Cir. 1993) 6

Jones v. Federated Department Stores, Inc., 527 F. Supp. 912 (S.D. Ohio 1981) 5, 7

Lang v. Gates, 36 F.3d 73 (9th Cir 1994) 6

Marek v. Chesny, 473 U.S. 1 (1985) 6, 8, 10, 11

Muckleshoot Tribe v. Puget Sound Power & Light, 875 F.2d 695 (9th Cir. 1989) 7

Rice v. Gates Rubber Co., 584 F.2d 135 (6th Cir. 1978) 5

Said v. Virginia Commonwealth University, 130 F.R.D. 60 (E.D. Va. 1990) 7

Thompson v. Gomes, 45 F.3d 1365 (9th Cir. 1995) 5

TABLE OF AUTHORITIES – Continued

Page

Trimper v. City of Norfolk, 58 F.3d 68 (4th Cir. 1995), *cert. denied*, ___ U.S. ___, 133 L. Ed. 2d 440 (1995) 9

Witcher v. Town of Matthews, 136 F.R.D. 582 (W.D. N.C. 1991) 7

STATUTES, RULES AND OTHER AUTHORITIES:

Fed. R. Civ. P. 68 ..... 2, 5, 7, 8, 9

RESPONDENTS' BRIEF IN OPPOSITION

Respondents respectfully request that this Court deny the petition for writ of certiorari.

OPINIONS BELOW

Respondents' offers of judgment, petitioners' acceptances and Judgments entered by the District Court for the District of Oregon are reprinted at Petitioner's Appendix 15-26.[1]

The Findings and Recommendations of the Magistrate Judge are reprinted at Pet. App. 27-32. The Order of the district court affirming the Magistrate's Findings is reprinted at Pet. App. 33-34.

The Order denying petitioners' Motion to Reconsider is reprinted at Pet. App. 35-36.

The Order submitting petitioners' appeal without oral argument to the United States Court of Appeals for the Ninth Circuit is reprinted at Pet. App. 13. The Ninth Circuit's Order denying petitioners' Motion to Reconsider is reprinted at Pet. App. 14.

The Opinion of the United States Court of Appeals for the Ninth Circuit is reported at 70 F.3d 1111 (9th Cir. 1995). It is reprinted and attached to petitioners' Petition for Writ of Certiorari at Pet. App. 1-10.

---

[1] Petitioners' Appendix is hereinafter abbreviated as "Pet. App."

The Ninth Circuit's Order denying petitioners' Petition for Rehearing/Suggestion of Rehearing en banc is not reported, but is reprinted at Pet. App. 11-12.

STATEMENT OF THE CASE

To the extent respondents' Statement of the Case differs from petitioners', respondents respectfully request the Court consider such differences as perceived misstatements of fact in the petition pursuant to Rule 15.2 of the Rules of the Supreme Court of the United States.

The underlying action in this case alleged civil rights violations actionable under 42 U.S.C. § 1983. Relevant on appeal are offers of judgment made and accepted by each petitioner pursuant to Federal Rule of Civil Procedure 68 ("Rule 68").

On June 10, 1993, respondents tendered offers of judgment to the individual petitioners which provided in relevant part:

> Pursuant to FRCP 68, defendants hereby allow judgement to be given against them in favor of plaintiff, Marcos Albert Guerrero, for a total of FIVE THOUSAND AND NO/100 DOLLARS ($5,000), *plus reasonable attorney fees and costs incurred by this plaintiff prior to the date of this offer in an amount to be set by the Court.*

Pet. App. 18-19 (emphasis added). The offer of judgment made to petitioner Virginia Guerrero differed only in the amount ($1,500); otherwise, all operative language was identical. Pet. App. 15-16.

Each petitioner accepted their respective offers June 16, 1993. Pet. App. 15-20. Judgement was entered in favor of the petitioners on June 21, 1993. Pet. App. 25-26.

Petitioners provided respondents with a copy of their attorney's billing records. Ninth Circuit Excerpted Record ("E.R." 20-21). Respondents deferred to the court for determination of the amount of fees and costs incurred in accordance with the terms of the offers. Pet. App. 15-19; E.R. 15, 20.

Petitioners' attorneys submitted a cost and attorney fee bill to the district court on July 20, 1993, along with a nine-page memorandum, attached exhibits, and a request for oral argument. E.R. 13-21. Petitioners submitted their first supplemental petition for attorney fees on July 23, 1993, along with an attached exhibit. Supplemental Ninth Circuit Excerpted Record ("Supp. E.R.") 19-29. The supplemental petition included over sixteen hours of time expended in creating the costs and attorney fee petition itself. Petitioners' attorneys claimed they were entitled to a total of $3,260.00 for time incurred after respondents' Rule 68 offers. E.R. 58.

Respondents opposed petitioners' second attorney fee bill by memorandum and affidavit filed July 29, 1993. E.R. 32-38. At issue were the amount of time spent before the offer of judgment, the hourly rate demanded, and the fees demanded for post-offer work, including time spent preparing the cost bill. E.R. 32-38.

Petitioners filed yet another supplemental fee petition on July 30, 1993. Supp. E.R. 15-18. At the same time, they submitted a sixteen page reply regarding the fee petition. E.R. 39-54.